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Mark J. O'Connor
oconnor@l-o-law.com

Tel 202/887-6230
Fax 202/887-6231

VIA HAND DELIVERY

March 5, 2003

EX PARTE

RECEIVED

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Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Notice of Oral *Ex Parte* Presentation
CC Docket Nos. 01-337; 02-33, 98-10, 95-20; 01-321

Dear Ms. Dortch:

On March 4, 2003, Dave Baker, Vice President of Law and Public Policy, EarthLink, and the undersigned met with the following Commission staff persons to discuss reform of *Computer III* access rules for broadband: Carol Matthey (Wireline Competition Bureau); Jane Jackson (Wireline Competition Bureau); Brent Olsen (Wireline Competition Bureau); Cathy Carpino (Wireline Competition Bureau); Terri Natoli (Wireline Competition Bureau); Harry Wingo (Office of General Counsel); William Kehoe (Wireline Competition Bureau); Michael Carowitz (Wireline Competition Bureau).

During the meeting, EarthLink generally described its ISP business, its approximately 800,000 broadband subscribers (the vast majority are either cable or DSL-based, and of which about half are DSL-based subscribers), and reiterated several points that it made in previously filed comments, reply comments, and *ex parte* presentations in the above-referenced dockets. In the course of the meeting, EarthLink provided to FCC staff persons the attached bullet-sheet and discussed many of the safeguards that are important for independent ISPs using BOC DSL services to offer retail high-speed Internet access.

In EarthLink's view, the Commission should retain Title II jurisdiction of ILEC-provisioned wholesale DSL and should continue to apply *Computer Inquiry* principles to ensure *nondiscriminatory* access to such telecommunications services for independent ISPs. Both in the attachment and in its prior submissions to the FCC, EarthLink has suggested ways of updating and streamlining *Computer III* obligations, and would be open to further discussion with the staff on these issues. EarthLink believes that *Computer II* safeguards should remain in place. Moreover, the BOCs have presented no substantial reason for the elimination of the access principles of *Computer III*. *Computer III* rules are not a disincentive for the BOCs to invest in broadband facilities and services. Should the public interest warrant deregulation, EarthLink

believes that the Communications Act demands the BOCs present a specific showing for specific regulatory relief or waiver, and not reclassification under Title 1, which would add additional legal uncertainty to ISP access rights.

Nondiscrimination requirements are critically important for independent ISPs to continue offering consumers choices of ISP features and functionalities that are distinct from the BOC ISP offerings. While BOCs currently provide the vast majority of DSL-based high-speed Internet access to residential consumers, EarthLink provides many distinct features including privacy functions, anti-spam and pop-up protections, and remote access. Hundreds of thousands of consumers today rely on independent ISP broadband services provisioned via BOC DSL. A radical departure from existing access rights is not only unwarranted under the law, but would also threaten the continuing service to those consumers. The BOCs have failed to present how ISPs with existing service arrangements would be adequately treated under a private carriage scheme. Even for consumers that have choice of cable or DSL platforms, the ability to switch from one platform to another, as EarthLink has described in its prior pleadings, impedes vibrant competition in today's market.

BOC DSL services are subject to Title II not merely by virtue of the application of *Computer III* requirements. Instead, BOCs have designed and offered the DSL services on a common carrier basis under federal tariffs since the 1998 *GTE DSL* order. BOCs have offered DSL services to ISPs because they had access to end user customers, ISPs were willing to take the risks of deployment, and ISPs have undertaken tremendous investment in promoting DSL. EarthLink estimates that it has spent \$500 million over the past four years to promote broadband services. Further, BOC DSL services are subject to Title II under a *NARUC I* analysis. Deregulation of the Title II and common carrier regulations should follow the process set forth in Section 10 and 11 of the Act, with a specific public interest showing. EarthLink believes that tariffing requirements provide some benefits vis-a-vis web-posting, such as: a single tangible source for rates, terms, and conditions of service; a record of changes made to service terms; an opportunity for pre-effective date review of proposed changes and intervention by the FCC's pricing division staff in the case of unreasonable service changes.

EarthLink elaborated on several issues raised in the attached bullet-sheet on *Computer III* reform. Reasonable and nondiscriminatory OSS is critically important for independent ISPs to serve the volume of customers that order DSL-based services. EarthLink is not seeking OSS comparable to that of CLECs, but does require nondiscrimination with the BOC's ISP and OSS that provides for reasonable ordering processes.

On pricing issues, EarthLink explained that BOCs appear to engage in predatory pricing and price squeeze through lowering retail rates in promotional discounts and by setting bulk DSL services prices well above cost. EarthLink referenced as examples EarthLink's prior submittals in the *Wireline Broadband* docket regarding the SBC-Ameritech promotions program and the Verizon PARTS tariff as examples of such BOC pricing conduct. Indeed, as an example of BOC inflated pricing, in some markets where EarthLink is able to obtain cable access, the BOC's

■ Lampert & O'Connor, P.C.

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access prices can be higher than that of the cable operator's prices. Indeed, were wholesale access prices to drop, retail prices would likely follow and the speed of retail broadband deployment would accelerate. EarthLink also explained that ONA principles are vitally important and that, as EarthLink understands it, there are examples in the record of ISPs using ONA for new services. ONA also provides ISPs with some bargaining leverage in negotiations with BOCs even those arrangements are not reported into the public record.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, ten copies of this Notice are being provided to you for inclusion in the public record in the above-captioned proceedings. Should you have any questions, please contact me.

Sincerely,



Mark J. O'Connor
Counsel for EarthLink, Inc

CC: Carol Matthey
Iane Jackson
Brent Olsen
Cathy Carpino
Terri Natoli
Harry Wingo
William Kehoe
Michael Carowitz

BROADBAND ISP COMPETITION
AND STREAMLINING COMPUTER INQUIRY

Reasonable and Nondiscriminatory Broadband Telecommunications Service Offerings

- *Computer II* unbundling and *Computer III* “equal access” should remain the standard. (*Computer III*, 104 F.C.C.2d at 1035-1037 (¶¶ 147-150)) Transmission and related functions used by the incumbent LECs must be non-discriminatory and transparent.
- Telecommunications service rates, terms and conditions should be under tariff, and service revisions should be sent by email with prior notice to affected customer-ISPs. Tariffing provides pre-effective data/review.

Functional and Equivalent Operations Support Systems (“OSS”)

- Efficient and mechanized OSS available to all ISPs, as a term of service.
- OSS should provide nondiscriminatory interfaces for pre-ordering (i.e., loop qualification), ordering, provisioning, and repair. Such interfaces should allow fully mechanized, real-time, two-way communications between the BOC’s systems and those of the independent ISP to the extent similar functionality is provided to the BOC ISP.

Investigate Broadband Predatory Pricing and Cross Subsidizing

- Incumbent LECs jointly market ISP services, and cross-subsidize their participation in the ISP market. FCC should conduct audits and investigations into the Incumbent LECs’ cost-allocation practices and processes.
- Example: Ameritech/SBC “promotional” discounts for high-speed Internet access at rates less than the wholesale DSL price.
- The issue is that the *wholesale DSL prices are too high*, and not that retail rates are too low. With lower wholesale prices retail prices can drop and spur broadband usage/deployment.

Enforcement that Is Effective and Efficient

- Effective *Computer III* obligations provide FCC, carriers and ISPs with greater degree of certainty of legal rights/obligations than Section 201/202 precedent, thereby increasing likelihood of settlements and reducing litigation.
- Dedicate Enforcement Bureau staff with relevant expertise to investigate ISP-related issues, such as unreasonable BOC tariff terms, predatory pricing, discrimination claims, etc. For safeguards to be effective, *Computer Inquiry* requires both FCC investigations and Section 208 complaints.
- Metrics for DSL provisioning should be implemented, consistent with proposals submitted in the *Special Access NPRM* (CC Dkt. 01-321).

Retain ONA Principles and Streamline the ONA Process

- *Computer III* ONA principles of access to broadband network should remain in place, so that ISPs may continue to offer consumers innovative service choices. ONA plans should be updated to include broadband network elements, and web-posted.
- ONA 120-day request procedures should be simplified, with a shorter request cycle and then immediate recourse to the FCC complaint process.